83 - 1847

In The

Supreme Court of the United States

October Term, 1983

No. _____

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF BEAUTY CULTURE, EJRY, INC., d/b/a RICHARD I BEAUTY SCHOOL, VIOLET CURRY and DOLORES ECTOR,

Petitioners,

-against-

GORDON AMBACH, as Commissioner of Education of the State of New York, and the Education Department of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE NEW YORK STATE COURT OF APPEALS

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Dated:
May 11, 1984

63 pp

QUESTIONS PRESENTED

1. Whether the privacy interests of the Petitioner students were unjustifiably invaded by imposition of data gathering processes which force schools to engage in speculative and covert decisions concerning the racial, ethnic, economic and handicapping characteristics of the Petitioner students?

2. Whether Respondent's failure to renew Petitioners' licenses to operate licensed beauty schools as a result of Petitioners' good faith refusal to compile by speculative and covert means, data on the racial, ethnic, economic, and handicapping condition characteristics of the student population violated the Petitioners' rights to due process under the Fifth and Fourteenth Amendment to the United States Constitution?

3. Whether or not Respondent's imposition upon Petitioners' of covert data gathering processes without first complying with due process procedural protections violated Petitioners' rights to due process?

4. Whether Petitioners were denied due process as a result of the Respondent's decision not to renew Petitioners' licenses without providing Petitioners with an opportunity for a hearing to determine whether Petitioners could in good faith comply with the directives of the Respondent concerning data gathering procedures?

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TREATISE:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF BEAUTY CULTURE, EJRY, INC., d/b/a RICHARD I BEAUTY SCHOOL, VIOLET CURRY and DOLORES ECTOR,

Petitioners,

-against-

GORDON AMBACH, as Commissioner of Education of the State of New York, and the Education Department of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE NEW YORK STATE COURT OF APPEALS

The Petitioners, Richard I, Inc., Ejry, Inc., Violet Curry and Dolores Ector respectfully request that a writ of certiorari issue to review the Decision and Order of the New York State Court of Appeals dated February 14, 1984. That February 14, 1984 Decision and Order affirmed an Order of the New York State Supreme Court, Third Judicial Department which had reversed an Order of the Supreme Court sitting at Special Term. The Supreme Court at Special Term, in a proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules, determined that the Respondent's imposition of informational reporting

requirements concerning, *inter alia*, race, ethnic background, economic status and handicapping conditions, was arbitrary, capricious and violative of Petitioners' privacy and due process rights.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto at p. A1 (see 62 N.Y.2d 784 __ NYS2nd __). The opinion of the Appellate Division, Third Department appears in the Appendix at A2-A4 (see 90 A.D.2d 127, 457 NYS2nd 583). The opinion of the Supreme Court at Special Term appears in the Appendix at pp. A5-A9 (see 109 Misc.2d 893, 441 NYS2nd 352).

JURISDICTION

The date of the Order sought to be reviewed by this Petition is February 14, 1984. Jurisdiction is conferred on this Court pursuant to subsection 2 of 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person...shall be deprived of life, liberty or property without due process of law. . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . .nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Subdivision one of section 5001 of New York's Education Law provides:

> 1. Schools required to be licensed. No private school which charges tuition or fees for instruction and which is not exempted hereunder shall be operated by any person or persons, firm, corporation, or private organization for the purpose of teaching or giving instruction in any subject or subjects, unless it is licensed by the education department. A private school as contemplated by this article shall be any entity offering to instruct or teach any subject by any plan or method including written. visual or audiovisual methods.

Subdivisions four and five of section 5003 of New York Education Law provide:

> 4. Disciplinary action. a. The commissioner for good cause, after affording a school an opportunity for a hearing, may take disciplinary action as hereunder provided against any school authorized to operate under this article.
>
> b. Good cause shall include, but not be limited to, any of the following:
>
> (1) fraudulent statements or representations to the department, the public or any student or enrollee, in connection with any activity of the school;
>
> (2) violation of any provision of this act or any rule of the board of regents or regulation of the commissioner;

(3) conviction of any owners, operator, director or teacher of any crime involving moral turpitude; or

(4) incompetence of any owner or operator to operate a school.

c. Disciplinary action includes a cease and desist order, mandatory direction, restriction of rights, powers or privileges, fine, penalty, suspension or revocation of an authorization to operate, or any combination of such action.

5. Hearings. The school shall be given reasonable notice of hearing, including the time, place and nature of the hearing and a statement sufficiently particular to give notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Opportunity shall be afforded to the school to respond and present evidence and argument on the issues involved in a fair hearing including the right of cross-examination. In a hearing the school shall be accorded the right to have its representative appear in person or by or with counsel or other representative. Disposition may be made in any hearing by stipulation, agreed settlement, consent order, default or other informal method. The commissioner shall, at the request of the school, furnish a copy of the transcript or any part thereof upon payment of the cost thereof. A hearing officer designated by the commissioner shall conduct the hearing and shall be empowered in connection therewith, to:

a. administer oaths and affirmations;

b. issue subpoenas in the name of the department, requiring attendance and giving of testimony by witnesses and the production of books, papers and other documentary evidence, and said subpoenas shall be regulated by the civil practice law and rules;

c. provide for the taking of depositions of witnesses;

d. regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents; and

e. direct the school to appear and confer to consider the simplification of the issues by consent. The strict legal rules of evidence shall not apply, but the decision shall be supported by substantial evidence in the record. A copy of the decision or order shall be delivered or mailed forthwith to the school or to its attorney of record at least ten days prior to the time it is to take effect.

STATEMENT OF THE CASE

Petitioners, Richard I, Inc. and Ejry, Inc. are private schools operated by New York corporations. Each offers a 1,000 hour program of instruction in beauty culture, graduation from which enables students to qualify to sit for the New York State Board Exam for licensure as a cosmetologist. Petitioners' schools are licensed by the Respondent Education Department pursuant to §5001 of the Education Law. Petitioners Violet Curry and Dolores Ector are two students at the schools who are directly affected by the State action under review.

By directive issued in a Memorandum from the Respondents to Petitioner schools and other similarly situated schools, Petitioner schools were required to submit certain informational forms. The forms were stated to be a part of the occupational education data system ("OEDS") which was to be implemented by Respondent in apparent disregard of the regulatory promulgation procedures set forth by the New York State Administrative Procedure Act.

The above-mentioned directive, *inter alia,* required submission of OEDS forms 7 and 8, which when completed would contain data on the racial/ethnic background, economic and academic disadvantagements and handicapping conditions of the schools' students. Notwithstanding that providing the data was not optional, the directive further noted that "schools cannot require students to identify their racial/ethnic background, academic or economic disadvantagements (including limited English speaking ability) or handicapping conditions". Instead, the schools were instructed to use "some sort of observational technique" to complete the forms, and to be prepared to document the procedures used.

As a matter of principle, Petitioners' schools refused to complete and submit portions of the forms in question which required compilation of data on the racial/ethnic background, economic and academic disadvantages, and handicapping conditions of the Petitioner schools' students. Petitioner schools' objections related to both the content of the forms and the manner in which the data was to be obtained. The refusal and the reasons for it were communicated to Respondents prior to any action by Respondents against Petitioners. The

Petitioner students objected to the material being compiled about them, and the manner in which it was to be compiled.

The result of Petitioner schools' refusal to complete OEDS forms 7 and 8 was the denial of Petitioner's license renewal applications, a demand that Petitioners close the schools within 60 days and, subsequently, a refusal to afford Petitioners an administrative hearing on whether good faith compliance with Respondent's directive was possible. The Respondents denied the renewal applications rather than move to revoke the Petitioner schools' licenses apparently for the reason that such a revocation would have required a hearing. See New York Education Law §5003, subds. 4 and 5. In this respect it is noteworthy that the OEDS forms were not part of the renewal applications.

As a result of the Respondent's actions, Petitioners commenced the instant proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules, seeking a Judgment (1) annulling the Respondent's determination which had denied Petitioner schools applications for renewal of their licenses and ordered the schools to cease operation as licensed schools; and (2) to enjoin Respondents from requiring Petitioner schools to collect and report the data as required in OEDS forms 7 and 8. The Federal Constitutional issues sought to be reviewed were raised in paragraphs 16 through 34 of the Petition by which this preceeding was commenced. (The Petition is reproduced in the Appendix at pp. A21 through A35). By decision dated July 14, 1981, Petitioners were awarded the requested relief by a Decision of the New York State Supreme Court, sitting at Special Term.

By Order dated December 20, 1982, the Appellate

Division, Third Department reversed the Judgment of Special Term and dismissed the Petition. By Order dated and entered February 14, 1984, the Order of Appellate Division, Third Department was affirmed by the New York State Court of Appeals.

REASONS FOR GRANTING THE PETITION

RESPONDENTS' FAILURE TO RENEW PETITIONERS' LICENSES TO OPERATE LICENSED BEAUTY SCHOOLS VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS OF PRIVACY AS WELL AS PETITIONERS' RIGHTS OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A

The Coercive Implementation of the OEDS System Violated Petitioners Constitutional Rights

Justice Brandeis, recognizing the fundamental constitutional right of privacy, wrote in dissent that the framers of the Constitution "conferred, as against the government, the right to be let alone--the most comprehensive of all rights and the most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928). This fundamental constitutional right also has been recognized by the Congress of the United States. See generally 5 U.S.C. §552(a); P. L. 93-579 §2(2) (4). It is clear that the Respondents in this case violated this fundamental right of Petitioner students to be let alone.

The Petitioner schools are required, through the

completion of the OEDS forms, to make the Petitioner students the subject of classifications by school personnel based on race, ethnic background, economic disadvantages, and handicapping conditions. The Petitioner schools promptly objected to being forced to participate in these violations, and it is clear that Petitioner schools have standing to raise this privacy objection of the students. *Runyon v. McCrary,* 427 U.S. 160; *Pierce v. Society of Sisters,* 268 U.S. 510.

By the terms of the OEDS directive, which was not the product of any direct statutory delegation of authority, nor the product of any duly promulgated regulation, the students could not be required to provide Petitioner schools with the information necessary to make the categorization decisions. Instead Petitioner schools were required to use covert "observational" judgments to arrive at the conclusions regarding the personal characteristics of the student body.

Respondents asserted below that these procedures would not result in individualized data being maintained for particular students, because the data was maintained for the student body as a whole, and that accordingly personal privacy rights of the students were not at issue. However, this clearly is not the case. Such a compilation entails staff conversations, speculation, and even stereotyping as to each student's race, national origin, handicap and/or economic status.

If the OEDS forms are to be fully completed, school personnel must form an opinion, based on observation, on such things as whether the individuals' origins trace back to the Indian subcontinent or a Pacific island, whether the family income of a given student is at a certain level, or whether the student is under

guardianship or has been institutionalized. No factors such as intermarriage, differing choice of life style, or similarity of outward characteristics of differing racial groups would reasonably be incorporated in the categorization process.

It is clear that the demographic data sought on the entire student body could not be compiled by observing a whole group; rather it could only be compiled from individualized observation. It is these individual observations and the conclusions based on little more than sheer speculation which the Petitioner schools do not wish to perform and which the Petitioner students find offensive to their right of privacy and their right to be free from unjustified governmental intrusion. Cf. *United States* v. *Little*, 321 F. Supp. 388.

This Court has repeatedly recognized the privacy interest of individuals to be free from unreasonable government intrusion into their private lives. See *Whalen* v. *Roe*, 429 U.S. 589; *Roe* v. *Wade*, 410 U.S. 113; *Eisenstadt* v. *Baird*, 405 U.S. 438; *Stanley* v. *Georgia*, 394 U.S. 557; *Grizwald* v. *Connecticut*, 381 U.S. 479. Here the unreasonable nature of the intrusion is clearly demonstrated by the nature of the personal data demanded (i.e. race, economic status and handicapping conditions); the speculative and statistically invalid method of compiling the data (see Paragraph B infra); and the complete absence of any procedural safeguards over the compilation process (see Paragraph C infra).

B

The OEDS System Infringes on Petitioners' Constitutional Rights to Due Process

The required collection and reporting of data on the OEDS forms, and the use of the so-called "observational technique" to acquire the information, constituted a violation of Petitioners' due process rights due to the irrational and unduly intrusive manner in which the OEDS directive was required to be executed. The OEDS forms are problematical first with respect to the method by which the desired data is to be gathered. The directive states:

> These data categories are not voluntary, however, and schools should use some sort of observational technique at the time of registration (or other appropriate time) to obtain the data needed to complete these sections of the forms.

Respondents clearly have stated that the schools cannot require students to provide the information. This leaves it to the school officials to make evaluations on each student's physical, emotional, and mental state. Thus, the Petitioners' schools must decide, based on observation, whether a student has a "serious health impairment," a "serious emotional disturbance," or perhaps an indication of "mental retardation." The employees of Petitioners' schools found themselves untrained and unable to make such personal and medical evaluations.

No standards or statistically viable techniques were offered to enable Petitioner schools to make the required judgments. Thus, the demand for such detailed data

in the context in which it was required, forced Petitioner schools to engage in speculative, irrational and personally intrusive inquiries that directly violated the constitutional privacy rights of their students. Such a procedure is constitutionally offensive to the schools based on their standing to raise the students' privacy interests, *Runyon v. McCrary,* 427 U.S. 160, and also based on the schools' due process and privacy rights not to be required to engage in morally offensive conduct unless a compelling and legitimate need for the compulsion is shown. See *West Virginia State Board of Education v. Barnette,* 319 U.S. 624.

The required categorizations on race or ethnic background are equally inexact and offensive. For example, without benefit of an ability to inquire of the students or any other rational categorizing tool, Petitioners were required to place, through covert observations, their students into one of the following categories: White, Hispanic; Black not of Hispanic origin; Black of Hispanic origin; American Indian; Alaskan; and Asian or Pacific islander.

It is clear that in order to justify government categorizations based on race or ethnic background, the categorization must withstand "strict scrutiny" and overcome an inherent suspicion of such classifications. See e.g. *Brown v. Board of Education,* 347 U.S. 483. The scrutiny should be no less strict where the government is forcing private educational institutions to do the categorizing function; particularly where, as here, the private school finds the process to be morally offensive. In this case, even a modicum of scrutiny would invalidate the OEDS system--the fact that the data thus obtained was the product of no more than sheer speculation was, in effect, admitted

by Respondents in the directive, because the data was expressly excluded by Respondent from any audit requirement.

Equally absurd was the assumed ability of the Petitioner schools to determine by observing whether students are living at or below the poverty level.

But the indicators of the irrationality of the OEDS categorization process do not stop with Respondents own admissions. For example, if it is true as Respondents argued below that the data obtained is to be used as a benchmark to determine the existence of possible discrimination, it is noteworthy that Respondents have never revealed that with which the benchmark data is to be compared. Certainly, it would be unrealistic to compare such data against general demographic characteristics of the population, because there has been no showing that such characteristics are reflected in the pool of applicants to cosmetology schools. In addition, Petitioners were never required to supply data on all applicants to their schools, but only on those who eventually were admitted. Clearly, unless the pool of applicants is compared with the pool of enrollees, no meaningful conclusion regarding discrimination can be derived. It is also important to note that no charge of discrimination ever has been leveled against Petitioners, and Respondents cannot point to any statutory authorization to use such a benchmark, instead of concrete investigation of complaints.

OEDS also is irrational because there is no likelihood that schools submitting the non-auditable OEDS data would do so in a manner incriminating themselves regarding discriminatory practices. Moreover, it is

irrationally and fundamentally offensive to place Petitioners in the position of providing data in an attempt to prove they are not engaging in discriminating practices, when they do not stand accused of discriminatory practices.

The failure of the OEDS reporting requirements to withstand any degree of scrutiny is further demonstrated by the fact that Petitioners, as unwilling agents of the State in the compilation process, have never been informed of the criteria to be applied to the data obtained, nor has there been any statutory or regulatory articulation whatsoever as to how the OEDS data is to be used. If the Petitioners are to have the data used against them as the possible targets of any allegation of discrimination, schools in Petitioners' position should certainly have the benefit of knowledge of the standards with which they must comply.

The Petitioners' schools could not, in good conscience or good faith, facilitate the use of speculative and invalid data that results from direct invasion of the privacy of their students. It is one thing to realize that speculative categorization processes are being utilized in private education by the government. It is quite another to be forced to participate in it.

Thus, this case raises important questions as to when and how the State can force a person to engage in behavior that is found by the person to be morally reprehensible. Certainly, as much as religious views, rational moral views concerning conduct mandated by the State falls within the "sphere of intellect and spirit" constitutionally protected from manipulation by the State. See *West Virginia State Board of Education*

v. *Barnette,* 319 U.S. 624, 642; Tribe, American Constitutional Law §15-5, pp. 899-900. There can be no rational distinction between a state forcing the espousal of beliefs that should be embraced only through free choice, and the state forcing conduct that is part and parcel of a belief structure that is offensive to he who is forced to act.

The record in this case makes it abundantly clear that Petitioner schools objected to the OEDS system on moral grounds and considered the OEDS system an unjustified exacerbation of the state's intrusion into the private education system. See *Pierce* v. *Society of Sisters,* 268 U.S. 510. Petitioners also clearly communicated their belief to Respondent that the type of data required should never have been collected without a clear showing of need, and establishment of procedures to ensure that personal intrusiveness was minimized. Also, the Petitioners objected that "observational" compilation of data should never have been required without a clear showing that it would result in information that would in fact be likely to fulfill the asserted purpose for which it was required. Under the OEDS, to make matters worse, such purposes never were articulated at all.

Petitioners schools' objections related to a fundamental disdain for being involuntarily used as a government agent in this covert intrusive process. Notwithstanding these deep rooted objectives, Petitioner schools were forced to comply or lose their licenses, and Petitioner schools were provided with no forum whatsoever in which to voice their objections to these impositions upon them.

C

Petitioners Were Deprived of Due Process as a Result of the Total Absence of Controls Over Procedures Utilized to Derive the Information Used in the OEDS System

In contradiction to the scheme for maintaining records of prescription drugs that was upheld in *Whalen* v. *Roe,* 429 U.S. 589 (1977) the OEDS reporting requirements cannot by any stretch of reasoning be characterized as "the product of an orderly and rational legislative decision." 429 U.S. 589, 597, supra. Instead OEDS was implemented by administrative fiat, with no political control or input whatsoever over whether such a system should be implemented, and if so, how it should be implemented. In this respect it is noteworthy that Petitioners strenuously argued in the courts below that the directive was invalid because it never was subjected to the formal regulation promulgation process, as required by the New York State Constitution, and thus never was subjected to the normal political inhibitions against such intrusive and irrational programs. Indeed, the failure to follow normal promulgation processes wrongfully deprived Petitioners of their rightfully expected input into the only political system available to challenge the OEDS implementation. This access to a political system, too, has been recognized as a fundamental constitutional right not to be lightly abrogated. *Wesberry* v. *Sanders,* 376 U.S. 1 (1964).

Moreover, in this era of increasing governmental intrusion into the rights of citizens by informational reporting requirements, see generally Tribe, American Constitutional Law, §15-7 pp. 966-973, it would be

outrageous to conclude that there need be no procedural controls over compilation and use of personal information. The threat of misuse of such information, and indeed the right to compile and hold it in the first place, raises important due process constitutional questions. See *California Bankers Ass'n. v. Schultz*, 416 U.S. 21, 78 (concurring opinion of Powell, J.) 79 (dissenting opinion of Douglas, J.) 91 (dissenting opinion of Brennan, J.) 93 (dissenting opinion of Marshall, J.).

Considering the OEDS informational requirements against any reasoned constitutional standard requires their abrogation. No express statutory authorization for them exists; no clearly articulated regulation implements them, and there has been a total absence of any meaningful public scrutiny of the need for the informational requirements, or the uses to which the information will be put. Simply stated, no procedural protection beyond the whim of an agent of Respondent has preceded the implementation of a wholesale and highly personal information gathering scheme, and due process will not admit of such a lack of fundamental procedural protections. For this reason, the OEDS requirements should, on due process analysis, be treated as a legal nullity.

D

The Petitioners Were Denied Due Process By the Refusal to Afford Them a Hearing

The actions of the Respondent in requiring Petitioner schools to complete the OEDS forms are rendered more outrageous by the refusal of the Respondents to afford Petitioners a constitutionally mandated hearing

concerning the deprivation under review. See *Golderg v. Kelley,* 397 U.S. 254 (1970). Appellants promptly requested a hearing and a stay of the denial of their license renewal shortly after they were advised that their applications for license renewal were denied. However, Respondents denied the request for a hearing, thereby preventing the Petitioners from articulating the moral and practical objections that they had to the OEDS reporting requirements. Certainly, it would have been an appropriate fact to establish at such a hearing that Petitioners were morally and practically unable, in good faith or with any degree of accuracy, to comply with the directive of the Respondents regarding the OEDS forms and the personal data of their students. Moreover, the denial of the license renewals was an apparent subterfuge to deprive Appellants of the hearing that would have been afforded had revocation proceedings been commenced.

Section 5003 of the New York Education Law empowers the Commission of Education to suspend or revoke a school's authorization to operate, but no final determination of revocation is made until the school is afforded an opportunity for a hearing (Education Law, §5003, subd. 4). However, instead of providing such a hearing, Respondents contended that no hearing was necessary due to the fact that Appellants failed to complete the license application process based on the failure to submit the OEDS forms. In this respect it is noteworthy that there is nothing in the Record to demonstrate that the OEDS forms were part of the license renewal process. The OEDS forms never have been required to be submitted with the license application, and this is clearly demonstrated by the fact that the OEDS forms were submitted by all schools on the same date, while different schools

did not necessarily have the same renewal date for their licenses.

In any event, it is clear that Petitioners were licensed, operating schools at the time of the renewal applications, and that denial of these applications for failure to submit the OEDS forms and the directive to close the school doors cannot be characterized as anything other than a revocation of previously granted authority to operate as licensed schools. The refusal to submit the data in question was a matter of principle, and Respondent's action was obviously punitive and designed to do far more than enforce the informational requirements of the application process. It was designed to eliminate an existing authorization to operate schools.

The renewal process involves the right to continue in business, a recognized property right which entitles the holder to due process protections *Duplex Co. v. Deering,* 254 U.S. 443, 465; *Truax v. Corrigan,* 257 U.S. 312. For the Petitioners, as private schools, the license renewal process involves their very right to exist, and this right has been afforded constitutional status. *Pierce v. Society of Sisters,* 268 U.S. 510. Therefore, in the face of such punitive action designed to divest an existing right to operate the schools, Petitioners were entitled to a hearing on constitutional due process grounds.

CONCLUSION

A writ of certiorari should be issued to review the opinion and judgment of the New York State Court of Appeals.

Respectfully submitted,

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APPENDIX

A1

Decision, Court of Appeals.

No. 35

In the Matter of Richard I, Inc., et al.,

Appellants,

v.

Gordon Ambach, as Commissioner of Education of the State of New York, et al.,

Respondents.

Order affirmed, with costs, for reasons stated in the opinion by Justice Michael E. Sweeney at the Appellate Division (90 AD2d 127).
Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Kaye concur.
Judge Simons took no part.

In the Matter of RICHARD I, INC., Doing Business as RICHARD I SCHOOL OF BEAUTY CULTURE, et al., Appellants, v GORDON AMBACH, as Commissioner of Education of the State of New York, et al., Respondents.

Argued January 9, 1984; decided February 14, 1984

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 20, 1982, which (1) reversed, on the law, a judgment of the Supreme Court at Special Term (HAROLD J. HUGHES, J.; opn 109 Misc 2d 893), entered in Albany County in a proceeding pursuant to CPLR article 78, annulling determinations of respondents which denied petitioners' applications for renewal of their licenses, declaring that respondents did not possess the authority to require private schools to collect and report data required in occupational education data system (OEDS) forms 7 and 8, and remanding the proceeding to respondents for reconsideration of the license applications, and (2) dismissed the petition.

Petitioners, as operators of private cosmetology schools licensed by the State Education Department, sought to challenge denial of their license renewal applications, which occurred after petitioners refused to submit information concerning their students' racial and ethnic background, possible academic and economic disadvantages, and related information. Petitioners then commenced this proceeding to annul the determinations and for injunctive relief, contending that respondents' actions were illegal and beyond statutory or regulatory authority; that peti-

tioners were entitled to a hearing before denial of their applications; and that respondents' determinations were arbitrary and capricious.

The Appellate Division concluded that there was broad authority both by statute (Education Law, § 5003, subd 2, par b) and regulation (8 NYCRR 126.10 [b] [2], [3]) to justify respondents' right to compel submission of the forms in question; that the "observational technique" adopted by respondents to gather the required data was not arbitrary and capricious; that the information supplied did further the purposes of the Legislature in monitoring discrimination in the school system; that the students' right of privacy was not violated, and that a hearing was not required on the denial of a renewal application.

Matter of Richard I v Ambach, 90 AD2d 127, affirmed.

HEADNOTE

Schools - Private Schools - Licensing

In a proceeding to annul determinations of the State Education Department denying applications by petitioners for renewal of their licenses to operate cosmetology schools because petitioners refused to submit required information on the application forms concerning students' racial and ethnic backgrounds, possible academic and economic disadvantages and related information, an order of the Appellate Division, which reversed a judgment annulling the determinations and dismissed the petition, is affirmed for reasons stated in the thereat, which concluded that there was broad authority both by statute (Education Law, § 5003, subd 2, par b) and regulation (8 NYCRR 126.10 [b] [2], [3]) to justify respondents' right to compel submission of the forms in question; that the "observational technique"

adopted by respondents to gather the required data was not arbitrary and capricious; that the information supplied did further the purposes of the Legislature in monitoring discrimination in the school system; that the students' right of privacy was not violated; and that a hearing was not required on the denial of a renewal application.

APPEARANCES OF COUNSEL

Thomas F. Gleason, Peter L. Danziger and *Barbara G. Billet* for appellants.

Frederick W. Burgess, Robert D. Stone and *Donald O. Meserve* for respondents.

OPINION OF THE COURT

Order affirmed, with costs, for reasons stated in the opinion by Justice Michael E. Sweeney at the Appellate Division (90 AD2d 127).

Concur: Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Kaye. Taking no part: Judge Simons.

In the Matter of Richard I, Inc., Doing Business as Richard I School of Beauty Culture, et al., Respondents, v Gordon M. Ambach, as Commissioner of Education of the State of New York, et al., Appellants.

Third Department, December 2, 1982

SUMMARY

Appeal from a judgment of the Supreme Court at Special Term (Harold J. Hughes, J.). entered August 5, 1981 in Albany County, which converted petitioners' proceeding, brought pursuant to CPLR article 78, into an action for declaratory judgment, and which directed the Department of Education to reconsider petitioners' applications for a renewal of licenses.

Matter of Richard I, Inc. v Ambach, 109 Misc 2d 893, reversed.

HEADNOTE

Schools - Private Schools - Licensing

Petitioners, operators of private cosmetology schools licensed by the Education Department, are properly required to file, as part of their periodic applications for renewal of licensure, information concerning students' racial and ethnic backgrounds, possible academic and/or economic disadvantages and other related information; when a school applies for renewal of its license, it must submit with its application "annual financial reports * and *** such other information as the commissioner may require" (8 NYCRR 126.10 [b] [2], [3]) and such broad authority is ample to justify respondents' right to compel submission of the required information; moreover, subdivision (8) of Section 313 of the Education Law provides that the Commissioner of Education "shall include in his annual report to the legislature *** recommendations for further action to eliminate discrimination in education", and the information requested contributes in effecting this legislative purpose.**

MTR OF RICHARD I v AMBACH [90 AD2d 127] [127]

APPEARANCES OF COUNSEL

Robert D. Stone (Frederick W. Burgess and *Jean M. Coon* of counsel), for appellants.

O'Connell & Aronowitz, P.C. (Peter L. Danziger and *Babara G. Billet* of counsel), for respondents.

OPINION OF THE COURT

Sweeney, J.P.

Petitioners operate private cosmetology schools licensed by the Education Department (department) under the provisions of article 101 of the Education Law. Pursuant to existing law, such schools are required to file periodic

applications for renewal of licensure (Education Law, §§ 5001, 5003). In 1979, the forms on which schools were required to report data to the department were revised so as to require information concerning their students' racial and ethnic backgrounds, possible academic and/or economic disadvantages and other related information. Petitioners refused to submit any data on the new forms which were supplied to them. Thereafter, on December 31, 1980, petitioners were notified without a hearing that their applications for renewal of their licenses were being denied for failure to submit the required forms, and that the schools had 60 days to cease operations. This CPLR article 78 proceeding was commenced seeking an annulment of the determination denying the license renewals and an order permanently enjoining the department from collecting the data in question together with an order compelling the department to grant the license renewals. Special Term annulled the determinations of the department, declared that the department did not possess the authority to require private schools to report the additional information in question, and remanded the proceeding for reconsideration of the license renewal applications (109 Misc 2d 893). This appeal ensued and respondents raise several issues urging reversal.

The paramount issue raised is whether the department has the requisite authority to compel petitioners to submit the forms with the additional requested data. Special Term concluded that they did not. We arrive at a contrary conclusion. Manifestly petitioners' schools fall within the category of schools required to be licensed (Education Law, § 5001). The licenses granted to the schools pursuant to section 5003 of the Education Law were for a period of two years with the right to seek renewal. The application for renewal must be accompanied by a statistical and financial report (Education Law, § 5003, subd 2, par b). The enabling statutes were interpreted by regulation providing that when a school applies for renewal of its license it must submit with its application "annual financial reports on forms prescribed by the commissioner and * * * such other information as the commissioner may require" (8 NYCRR 123.10 [b] [2], [3]). Such broad authority both by statute

and regulation, in our view, is ample to justify respondents' right to compel the submission of the forms in question. We find additional authority for respondents' action in subdivision (8) of section 313 of the Education Law which provides in pertinent part that the Commissioner of Education "shall include in his annual report to the legislature *** recommendations for further action to eliminate discrimination in education if such is needed". The forms, in our opinion, contribute in effectuating this legislative purpose. We find unpersuasive petitioners' contention that respondents lack authority to force petitioners to submit the forms without a specifically promulgated rule or regulation (see *Matter of Organization to Assure Servs. for Exceptional Students v Ambach*, 56 NY2d 518; *Matter of Rubin v Campbell*, 48 NY2d 805).

Petitioners also contend that the "observational technique" adopted by respondents to gather the data required by the forms was arbitrary and capricious since, *inter alia*, it amounted to only an educated guess and served no legitimate governmental purpose. Furthermore, petitioners claim that the manner of obtaining the information violated the students' right to privacy. Both contentions, in our view, lack merit. Petitioners misunderstand the real manner in which the data is to be obtained and the claimed onerous duty imposed. Initially, the schools have only to report data obtained by daily observations of the students in the classroom and school confines together with other information already in their possession gleaned from the original applications submitted by the students for acceptance by the school. While the information supplied is not foolproof, it does further the purpose of the Legislature to ascertain if any discrimination exists in the school system. It is also significant that the department is obligated, as a recipient of Federal assistance funds for use in vocational schools, to ensure that the funds are not being used in a discriminatory manner and to monitor the activities of these schools through the compilation of statistical data (44 Fed Reg 17162, 17165; 34 CFR Part 100, Appendix B). Such information would assist respondents in their affirmative continuing obligation to see that the funds are not used in a discriminatory fashion. Concerning petitioners'

contention that the technique adopted violates the students' right of privacy, we are of the opinion that it tends to ensure such right rather than violate it.

Finally, we reject petitioners' contention that they were improperly denied a hearing. It is significant that we are here concerned with a renewal application and not the suspension or revocation of an existing license. Under such circumstances, a hearing is not required (see *Matter of Hirsch v Hastings*, 70 AD2d 1052).

The judgment should be reversed, on the law, and the petition dismissed, without costs.

KANE, CASEY, WEISS and LEVINE, JJ., concur.

Judgment reversed, on the law, and petition dismissed, without costs.

Order Appellate Division.

PRESENT :

Hon. Michael E. Sweeney,
Justice Presiding,
Hon. T. Paul Kane,
Hon. John T. Casey,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,
Associate Justices.

In the Matter of RICHARD I, INC.,
Doing Business as RICHARD I SCHOOL OF BEAUTY CULTURE, et al.,
Respondents,

- against-

GORDON M AMBACH, as Commissioner of Education of the State of New York, et al.,
Appellants.

County Clerk's Index No. 1497-81

Appellants having appealed from a judgment of the Supreme Court of Albany County, entered on the 5th day of August, 1981, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Robert D. Stone, Frederick W. Burgess, Esq., of counsel for appellants, and by O'Connell and Aronowitz, Peter L. Danziger, Esq., of counsel for respondents, and, after due

deliberation, the Court having rendered a decision on the 2nd day of December, 1982, it is hereby

ORDERED that the judgment be and hereby is reversed, on the law, and the petition dismissed, without costs.

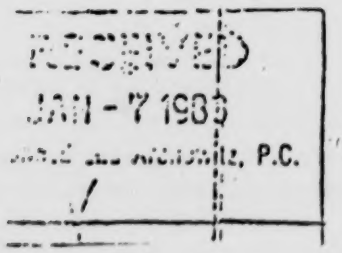
ENTERED:

JOHN J. O'BRIEN

Clerk

DATED AND ENTERED: December 20, 1982.

A TRUE COPY
John J. O'Brien
CLERK



A12

Article 78 Proceeding.

In the Matter of RICHARD I, INC., Doing Business as RICHARD I SCHOOL OF BEAUTY CULTURE, et al., Petitioners, v GORDON AMBACH, as Commissioner of Education of the State of New York, et al., Respondents.

Supreme Court, Special Term, Albany County, July 14, 1981

HEADNOTE

Schools — Private Schools — Licensing

Determinations of the Commissioner of Education denying license renewals to petitioners private cosmetology school operators on the ground that they failed to comply with an administrative directive that they include certain information regarding their students with the information to be submitted as part of their biannual license applications are annulled, where subject administrative directive required the schools to submit statistics on the number of handicapped and economically disadvantaged students and those with limited English-speaking ability, as well as a breakdown of the ethnic-racial background of the student population and further provided that schools employ "some sort of observational technique" to acquire this information, inasmuch as schools cannot require students to provide such information; this attempt, unauthorized by statute or regulation, to require private schools to gather by covert observational technique information about the private lives of their students that cannot be gathered by direct inquiry is arbitrary and capricious. Further, following petitioners' objections to gathering and supplying said information, respondents should have afforded petitioners a hearing pursuant to subdivision 5 of section 5003 of the Education Law and upon constitutional due process grounds; moreover, a valid issue as to a constitutional right to privacy violation, although not reached herein, is raised on these facts.

APPEARANCES OF COUNSEL

O'Connell & Aronowitz, P.C. (Peter L. Danziger of counsel), for petitioners. *Robert D. Stone* and *Frederick W. Burgess* for respondents.

OPINION OF THE COURT

HAROLD J. HUGHES, J.

This article 78 proceeding is brought pursuant to subdivision 6 of section 5003 of the Education Law to review determinations dated December 31, 1980 which denied the applications of petitioners for renewal of their licenses to operate private schools.

Petitioners operate private cosmetology schools subject to licensing by the Education Department (Education Law, § 5001, subd 1). The schools employ six instructors, two secretaries, a bookkeeper and a financial aid officer and have an enrollment of approximately 50 students. The schools have been licensed by the Education Department since the enactment in 1973 of the statute requiring licens-

ing. Pursuant to subdivision 3 of section 5001 of the Education Law a private school is required to renew its license biannually. On February 22, 1979 the Assistant Commissioner for Occupational and Continuing Education issued a directive advising private schools that a new system referred to as the occupational education data system (OEDS) was being implemented requiring schools to collect and report information regarding their students with the information to be submitted as part of the license application. The schools were required to complete OEDS forms 7 and 8 and to maintain records to substantiate the data. Petitioners objected, upon several grounds, to collecting the information sought and requested a hearing upon the issue. That request was denied and by written communications of December 31, 1980 petitioners were advised that their applications to renew licenses were denied by reason of their failure to submit OEDS forms 7 and 8 for the reporting period of July 1, 1978 to June 30, 1979. The schools were directed to cease operation within 60 days. This proceeding ensued.

The directive of February 22, 1979 provides in pertinent part:

"A number of schools returning comments have requested a citation of the Department's authority for the collection of information from their schools. Section 215 of Education Law empowers the Commissioner of Education with the general authority to collect information from any school or institution under the educational supervision of the State. Section 5003 of Education Law and Sections 126.7 and 126.11 of the Regulations of the Commissioner of Education contain specific mandates for the collection of information from Licensed Private Schools and Registered Private Business Schools. Data requested on OEDS forms 7 and 8 are part of the data to be required by the Department and all schools should begin to maintain records that are compatible with the information categories listed on the forms.

"The reports being sent to you for completion are the result of an extensive Department analysis and contain only the most essential data elements required for state level planning, administration and Federal reporting pur-

poses. Obtaining information from all types of educational agencies participating in the training process will enable the SED to develop a more accurate and comprehensive picture of the number of people being trained for employment in specific occupations. * * *

"The other types of information requested on OEDS forms will be exempted from audit since schools cannot require students to identify their racial/ethnic background, academic or economic disadvantagements (including limited English-speaking ability) or handicapping conditions. These data categories are not voluntary, however, and schools should use some sort of observational technique at the time of registration (or other appropriate time) to obtain the data needed to complete these sections of the form. Schools should be prepared to document the procedures they have used to summarize the data presented in these categories."

The specific instructions for completing OEDS form 7 direct in part, as follows:

"Disadvantagement, Handicapping Condition: In column 5, indicate the number of students reported in columns 1-4 that have academic and/or economic disadvantagements that markedly interferes with their ability to successfully complete their occupational program at this school. Academic disadvantages are defined as a lack of sufficient reading, writing or mathematical skills. Economic disadvantagements which may be considered are (1) unemployment, (2) receipt of public assistance (welfare) under federal state or local programs, (3) institutionalization or State guardianship, (4) family income below established poverty level criteria, or (5) Student Financial Aid Programs (i.e. BEOG, SEOG, TAP, Student Loans).

"In column 6, indicate the number of students reported in columns 1-4 that have handicapping conditions (other than academic or economic disadvantagements) that markedly interferes with their ability to successfully complete their occupational program. Handicapping conditions which may be considered are mental retardation, hearing impairments and deafness, speech impairment, visual impairment and blindness, serious emotional disturbances,

orthopedic impairments, and other serious health impairments.

"Students who have both an academic or economic disadvantagement *and* a handicapping condition should be *reported only once* in the handicapped category.

"Section II — Number of Students Enrolled with Limited English-Speaking Ability (LESA)

"Of the *total* number of students reported in Section I, columns 1-4, for all programs, indicate the number by sex, whose native tongue is a language other than English or who come from environments where a language other than English is dominant and because of either of these reasons have difficulties speaking and understanding instructions in the English language. Report students as 'LESA' only if their language impairment is severe enough for this school to provide special assistance or a modified program in order for the students to successfully complete the program.

"Section III — Racial/Ethnic Composition of Students Enrolled

"Of the total number of students reported in Section I, columns 1-4, for all programs, indicate the number of students identified as belonging to each of the racial/ethnic classifications defined below:

"*American Indian or Alaskan Native* — A person having origins in any of the original peoples of North America.

"*Black, not of Hispanic Origin* — A person having origins in any of the black racial groups.

"*Asian or Pacific Islander* — A person having origins in any of the original people of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Phillipine Islands and Samoa.

"*Hispanic* — A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

"*White, not of Hispanic Origin* — A person having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent.

"Schools do not have to require students to specify their race or ethnic background and/or maintain this information as part of the student's permanent record. Data to be reported here could be based on the observations of personnel involved in the registration process at the school or personnel having regular direct contact with the students (i.e. teaching staff, registrar, etc.)."

OEDS form 8 requests similar information with respect to handicapping conditions, economic disadvantage and racial-ethnic background. Petitioners vigorously protest the attempt by respondents under the guise of the licensing power to compel them to gather by covert observational techniques information about the private lives of their students that may not be obtained by direct inquiry of the students. Petitioners' objections are: (1) the directive of February 22, 1979 has never been formally adopted as a rule or regulation and thus is without binding effect; (2) there is no authority by statute or regulation authorizing the Education Department to gather the information requested in forms 7 and 8; (3) the required collection of the data by private schools is an intrusion and a costly burden upon private education; (4) no observational techniques exist which would enable the schools to gather the information requested in the forms; (5) the schools have been deprived of due process by the denial of their request for a hearing; (6) the administrative activity here under review is arbitrary and capricious; and (7) the petitioners', and their students', rights under the New York State and Federal Constitutions to privacy, liberty, and freedom from unjustified governmental intrusion have been infringed upon. Two students of the schools have joined in this proceeding as petitioners alleging violation of their rights to privacy.

Respondents' defenses are that: (1) sections 215 and 5003 of the Education Law and the regulations found at 8 NYCRR 126.7 and 126.11 mandate the collection of this information; (2) petitioners are the only schools of approximately 350 schools licensed and registered in the State which refused to supply this information and by failing to submit a complete license application they cannot now be heard to complain that the denial of renewal was arbitrary

and capricious; (3) petitioners' contention that they are unable to compile the required data by observational techniques is specious since 348 other schools have done so; (4) pursuant to Federal law and the regulations promulgated thereunder, schools having in attendance students receiving Federal moneys are required to compile information related to the racial and ethnic composition of the student populace and, having received direct financial aid, the petitioners are obligated by Federal law and regulations to compile and report data to the Federal authorities; (5) the data requested in the forms is necessary for long-range planning on the State and Federal levels with respect to the delivery of vocational educational programs; (6) there are other programs available for the individual student petitioners; therefore, the respondents seriously question statements made by the students in their affidavits; (7) the denial of a hearing was justified because the statute does not require a hearing when the applicant refuses to complete the license process.

The determinations denying renewal of petitioners' licenses shall be annulled. Initially, the Appellate Division has recently held that the Commissioner of Education may not adopt an across-the-board directive applicable in all instances to all applicants without formally adopting a regulation or rule to that effect *(Matter of Organization to Assure Servs. for Exceptional Students v Ambach,* 82 AD2d 993). That is precisely what the respondents did by a requirement that all private schools licensed by the State gather the information requested in OEDS forms 7 and 8 or be denied renewal of their licenses. Such a sweeping decree should be enacted with all of the safeguards attending formal adoption of a regulation and not by a directive from an assistant commissioner.

The petitioners' second objection to the determinations is equally well taken. In the area of information gathering from persons subject to its jurisdiction, an administrative agency is not free to act beyond the authority extended by statute or a regulation promulgated within the authority delegated by a State *(Rapp v Carey,* 44 NY2d 157). That is so in order to assure appropriate safeguards as to the

information gathered (*State of New York v Jacobus*, 75 Misc 2d 840, 845, 846). Here, the respondents rely upon the following language from subdivision 3 of section 5001 of the Education Law: "Application and renewal application for a license as a private school, together with financial and statistical reports required by the commissioner shall be filed on forms prescribed and provided by the department."

Additionally, respondents rely upon the language of 8 NYCRR 126.10 that requires an applicant for a license to conduct a private school to submit together with the application "such other information as [the commissioner] may require". Respondents also cite various Federal statutes and regulations for the authority to require the gathering of the data. The court has reviewed the language of the applicable statutes and regulations and finds no authority therein for the gathering of this information in the manner required by the respondents. This court holds that in view of the imposition of the onerous duties, costs, and invasion of privacy entailed by OEDS forms 7 and 8, specific statutory language authorizing the gathering of this information is required.

Respondents' reliance upon the allegation that the petitioners may be in violation of Federal statutes and regulations with respect to the submission of information is no basis for denying a license under State law since the Federal statutes and regulations specifically address noncompliance with required disclosure and contain their own penalties, such as the cutting off of Federal moneys.

The petitioners' fourth point with respect to the practical impossibility of gathering the information without direct inquiry of the students is valid. The court fails to discern how the petitioners can reasonably be expected to make covert investigation of the economic background of its students to ascertain a family's income and the sources thereof. Moreover, the operators of this cosmetology school cannot reasonably be required to make medical evaluations as to whether their students are mentally retarded or emotionally disturbed. Compelling untrained personnel to make sensitive evaluations of the mental, emotional and physical condition of students based upon covert observational techniques is, at best, irrational. Furthermore, to

complete OEDS forms 7 and 8 petitioners must determine by observational techniques whether their students have any serious health impairments that would interfere with their ability to finish the occupational program which might compel a serious invasion of students' privacy.

Turning to the request for racial and ethnic information, it would be unreasonable to expect the operators of these small private schools to determine simply by observation the ethnic and racial background of the students. Discerning a Pacific Islander from an Alaskan native, or a black not of Hispanic origin from a black of Hispanic origin, may be within the competence of the Department of Education but would be difficult for most members of society. Counsel for respondents recognized this upon the argument of the motion and conceded that all the Education Department wanted from the schools was "an educated guess". This court holds that it is not reasonable to formulate long-range planning on the State and Federal levels with respect to delivery of vocational educational programs based upon guesses educated or otherwise. Finally, there is something abhorrent in these inquiries that is counter to the accepted value of this society that persons should advance by merit unhindered by racial or ethnic background. The stereotyping by guess mandated by respondents cannot serve to further any legitimate governmental end.

Many of the other points raised by petitioner also have merit, but shall not be addressed at length. Suffice it to say, that the action of the respondents in attempting to require a private school to gather by covert observational techniques information about the private lives of their students that cannot be gathered by direct inquiry is arbitrary and capricious. Furthermore, under the circumstances of this case the respondents should have afforded petitioners a hearing both pursuant to the statute (Education Law, § 5003, subd 5) and upon constitutional due process grounds. Finally, were the court to reach the right of privacy contentions raised by the petitioners, it would be inclined to expand the right of privacy enunciated by the Supreme Court in cases such as *Griswold v Connecticut* (381 US 479) and *Shelton v Tucker* (364 US 479) to encompass a right of information privacy (see comment on The

Use and Abuse of Computerized Information, 44 Albany L Rev 589). The inexorable infringement upon citizens' privacy by governmental planners in the name of societal good requires from the courts close scrutiny to balance legitimate government needs against those of its citizens. Mr. Justice BRANDEIS stated the need of our citizens best in his dissent in *Olmstead v United States* (277 US 438, 478): "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."

The application of petitioners for a judgment annulling the determinations of December 31, 1980 which denied their applications for renewal of licenses and ordered them to cease operations shall be granted, without costs, and the court shall, to the extent necessary (*Matter of Croissant v Zoning Bd. of Appeals of Town of Woodstock*, 83 AD2d 673), convert the proceeding to an action (CPLR 103, subd [c]) and grant the requested declaratory relief declaring that the Commissioner of Education and the Education Department of the State of New York do not possess the authority to require private schools to collect and report the data required in OEDS forms 7 and 8, as the forms are presently comprised. This matter shall be remanded to the Education Department with direction to reconsider petitioners' applications for renewal of licenses in view of this decision, and the stay contained in the order to show cause of February 17, 1981 will be continued until petitioners receive notice from the Education Department of its determination upon the reconsideration of the license renewal applications.

Petition.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the
Application of Richard I,
INC. d/b/a Richard I School
of Beauty Culture, Ejry, Inc.
d/b/a Richard I Beauty School,
Violet Curry, and Delores Ector,

Petitioners,

-against-

VERIFIED PETITION

Gordon Ambach, As
Commissioner of Education
of the State of New York,
and the Education Department
of the State of New York,

Respondents.

For an Order and Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

To: THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF ALBANY

Petitioners, by their attorneys, O'Connell and Aronowitz, P.C., as and for a Petition, respectfully allege that:

1. Ejry, Inc. is a domestic corporation doing business as Richard I Beauty School located in Poughkeepsie, New York, Richard I, Inc. is a domestic corporation doing business as Richard I School of Beauty Culture located in Kingston, New York, (hereinafter referred to as "the schools"). Richard I School of Beauty Culture in Kingston was established in 1963, and Richard I Beauty School in Poughkeepsie was established in 1965. The schools offer a 1000 hour program of instruction to qualify students to take the New York State Board Examination for Licensing as a Cosmetologist. Upon successful completion of the program a student may obtain a six month permit to work as a cosmetologist.

2. The schools have been licensed by the New York State Education Department and are accredited by the Cosmetology Accrediting Commission (the national accrediting body for cosmetology schools recognized by the United States Department of Education). The schools have been approved by the New York State Education Department for the training of veterans, the New York State Education Department-Office of Vocational Rehabilitation and the United States Department of Health and Human Resources Social Security Administration.

3. The schools employ six instructors, two secretaries, a bookkeeper and a financial aid officer. More than fifty students are currently enrolled in the schools.

4. Petitioners, Delores Ector and Violet Curry reside in the State of New York and are presently attending the schools.

5. Respondent Gordon Ambach is the duly appointed and serving Commissioner of Education of the State of New York, with his principal office located in the City and County of Albany, and as such is the Chief Administrative Officer of the Education Department, a Department of the State of New York responsible for licensing of private schools, (hereinafter referred to as the " State Education Department").

6. The schools have been operated under the supervision of the State Education Department since they were established in the 1960's. In 1973 New York statutes were enacted requiring private schools to be licensed by the State Education Department. The schools, thereafter, were licensed by the State Education Department and each year submitted an application for annual renewal of license as required pursuant to §5001 of the New York State Education Law and § 126.10 of the regulations of the Commissioner of Education.

7. Section 5001(3) of the New York State Education Law provided that:

Application, renewal application and fees. Application and annual renewal application for a license as a private school, together with financial and statistical reports required by the Commissioner shall be filed on forms prescribed and provided by the Department...

(Section 5001(3) was amended in 1980 to provide biannual renewal).

8. Section 126.10 of the regulations of the Commissioner of Education (as amended January 1, 1980), provide that:

School license or registration required; licensing or registration procedure.

(a) Every applicant shall submit an application for licensure of a private school or registration of a private business school, upon forms provided by the Commissioner, together with such other information as he may require including applications for approval of curricula or courses of study, quarters or facilities, director's licenses and teacher's licenses, and documentation of adequacy of resources. The application shall be accompanied by the statutory fee.

(b) An application for annual renewal of any license or registration shall be submitted at least 60 days prior to the expiration date of the current authorization, on form prescribed by the Commissioner and accompanied by:

(1) The statutory fee.

(2) Annual statistical and financial reports on forms prescribed by the Commissioner.

(3) Such other information as the Commissioner may require...

9. Section 126.3 (e) of the regulations of the Commissioner of Education (as amended January 1, 1980) require that each licensed private school publish a catalog or bulletin which includes:

(iii) data regarding student retention and job placement for the two most recent reporting periods, or average thereof so identified for each course or program, indicating the number of students who are enrolled at the start of the reporting period; the number enrolled during the reporting period; the number still attending at the end of the reporting period and the number who have graduated and discontinued during the reporting period; and the number of those graduates placed during the reporting period and the occupation for which they were trained. Reporting period is defined as that 12 month period of time commencing 15 months prior to expiration of license or registration and ending 3 months prior to expiration of license or registration, or as otherwise defined by the Commissioner;...

10. Other regulations of the Commissioner of Education regarding licensed private schools set forth many general and specific requirements regarding conduct of the school, advertising, standards and methods of instruction, equipment and housing, qualifications of teaching and management personnel, enrollment agreement or contract and methods of collecting tuition and other charges, resources, bond, school license or registration required, records, private school agent's certificate, exemptions and disciplinary action.

11. By directive dated February 22, 1979, issued by the Assistant Commissioner for Occupational and Continuing Education, the schools were advised that a new system referred to as the Occupational Education Data System ("OEDS") was being implemented to require schools to collect and report information regarding their students. Schools were required to complete OEDS forms 7 and 8 and to maintain records to substantiate the data. (A copy of the directive dated February 22, 1979, together with OEDS forms 7 and 8 is annexed hereto as Exhibit "A").

12. The new directive was neither a rule promulgated by the Board of Regents of the University of the State of New York nor a regulation promulgated by the Commissioner of Education and the Board of Regents.

13. The directive required schools to collect data and report on:

(a) The number of students enrolled in the program.

(b) The number of students completing the program.

(c) The number of students leaving prior to completion.

(d) The number of students completing who became employed and whether they were employed in a related field, slightly related field, unrelated field, or military.

(e) The number of students unemployed and whether they were seeking employment, pursuing additional education or other reason.

(f) The number of students with status unknown.

(g) The number of students leaving the program prior to completion and whether they had obtained employment, entered military, dropped out-financial reasons, dropped out-other reasons, failed to meet program standards, or the program did not meet student needs/expectations.

(h) The information was also reported by the sex of the student.

14. The new directive also requires schools to collect data and report on the number of students having a disadvantagement or handicapping condition that markedly interferes with their ability to successfully complete their programs. Academic disadvantages are defined as a lack of

sufficient reading, writing or mathematical skills. Economic disadvantages which may be considered are unemployment, receipt of public assistance (welfare) under federal, state, or local programs, institutionalization or State guardianship, family income below established poverty level criteria, or Student Financial Aid Programs (i.e. BEOG, SEOG, TAP, Student Loans). Handicapping conditions which may be considered are mental retardation, hearing impairments and deafness, speech impairment, visual impairment and blindness, serious emotional disturbances, orthopedic impairments, and other serious health impairments. (See Exhibit "A", directive dated February 22, 1979, pages 3-4).

15. The schools are also required to collect data and report on the number of students belonging to each of the following racial/ethnic classifications.

(a) American Indian or Alaskan Native.
(b) Black, not of Hispanic Origin.
(c) Asian or Pacific Islander.
(d) Hispanic.
(e) White, not of Hispanic Origin.

16. In order to obtain information on retention and placement, the schools must contact students after they drop out or graduate. This task is very time consuming, expensive and the information obtained often is unreliable. Students may be uncooperative or provide inaccurate information.

Richard I Beauty School and Richard I School of Beauty Culture are proud of their record of placement of graduates, but believe the requirements to gather this information is an infringement on the students and the schools liberties and personal freedoms. The schools do not use placement statistics in advertising nor do they use the statistics for recruitment purposes. Although students at the schools may be eligible for state or federal loans or grants the schools do not receive any local state or federal monies. Petitioners assert that the required collection of this data by the schools is an unwarranted intrusion into and a costly burden upon private education.

17. No New York State statute, rule nor regulation requires schools to provide such specific information as set forth in the OEDS forms 7 and 8 such as whether students are disadvantaged, handicapped of limited English speaking ability or belonging to specified racial/ethnic classifications.

18. In a Report to the Commissioner of Education dated July 5, 1979, the State Education Department admitted that §126.3 of the Commissioners Regulations did not provide the authority for the implementation of the OEDS. (Copy of page 6 of report, annexed as Exhibit "B"). Although the State Education Department recommended amendments to the regulations to provide for implementation of the OEDS, no such regulations were promulgated.

19. In his directive, dated February 22, 1979, the Assistant Commissioner for Occupational and Continuing Education stated that:

> ...schools cannot require students to identify their racial/ethnic background, academic or economic disadvantagements (including limited Englishspeaking ability) or handicapping conditions. These data catagories are not voluntary, however, and schools should use some sort of observational technique at the time of registration (or other appropriate time) to obtain the data needed to complete these sections of form. Schools should be prepared to document the procedures they have used to summarize the data presented in these categories. (Emphasis added) (See Exhibit "A", Directive dated February 22, 1979, page 2).

20. By letter dated March 14, 1979 and March 20, 1979, the schools objected to the new requirements imposed by directive of the Assistant Commissioner for Occupational and Continuing Education and raised questions and asked for clarification of many issues including: a request for a description of "observational techniques" which would enable schools to obtain the required data regarding disadvantagement, handicap or racial/ethnic classification. (Copies of letters dated March 14, 1979, and March 30, 1979, are annexed as Exhibit "C").

21. The State Education Department has never described to the schools the observational techniques to be used to collect and report on the racial/ethnic classification of its students nor regarding disadvantagement nor handicapping condition.

22. No observational techniques exist which would enable the schools to meet the new requirements of OEDS Forms 7 and 8.

23. The schools do not discriminate against students nor prospective students and they never have been accused of doing so by Respondents.

24. The schools submitted applications for renewal of licenses, completing all information as they had done in prior years, including information regarding student retention and job placement, but the schools refused to prepare or file OEDS forms 7 and 8.

25. By letter dated December 31, 1980, the schools were advised that their applications for renewal of licenses were denied because they had not submitted OEDS forms 7 and 8 for the reporting period July1, 1978 to June 30, 1979. The schools were advised that they had 60 days from the date of the letter to cease operation as licensed schools. (Copies of letters dated December 31, 1980, are annexed hereto as Exhibit "D" together with copies of OEDS forms 7 and 8 for the reporting period July 1, 1978 to June 30, 1979).

26. The schools had orally requested a hearing prior to denial of their application for renewal of license and prior to their revocation of their authority to operate as licensed schools, and subsequently the schools by their attorneys, requested a hearing and a stay of the matter pending resolution of the issues. (A copy of letter dated and served on January 29, 1981, is annexed hereto as Exhibit "E").

27. By letter dated February 10, 1981, Respondent Ambach denied the schools requests for a hearing and for a stay.

28. Petitioners, Richard I School of Beauty Culture and Richard I Beauty School have been operating as private schools in the State of New York under the supervision of the New York State Education Department for over 15 years. The schools have been duly licensed as private schools since required by statute in 1973.

29. The schools are entitled to a due process hearing prior to action by Respondents which restrict their rights, powers or privilege or which revoke or deny their authorization to continue to operate.

30. If the schools are denied their authority to operate as licensed schools, they will be irreparably harmed by reason of loss of reputation and standing in the academic community, loss of approval by various state and federal agencies, loss of national accreditation, closure of the schools and resulting financial damage.

31. If the schools are denied their authority to operate as licensed schools, the students of the schools will be irreparably harmed by the discontinuation of their educational programs, by the loss of their free choice of educational institution and programs, by their inablility to complete required programs to enable them to work as cosmetologists and by their loss of employment opportunities.

32. Petitioners Curry and Ector will suffer immediate and irreparable harm and will be unable to enroll in or attend educational programs of equal quality as those offered in the schools, by reason of unavailability of other similar educational programs which are geographically accessible and financially accessible to these Petitioners.

33. Respondents have proceeded in excess of their jurisdiction and in excess of any statutory or regulatory authority, have made a determination in violation of lawful procedure which was arbitrary and capricious and an abuse of discretion.

34. Petitioners' New York State and Federal constitutional rights have been violated and their basic rights to privacy, liberty and freedom from unjustified governmental intrusion have been infringed upon.

35. No other provisional remedies have been sought in this matter.

Wherefore, Petitioners respectfully request that this Court grant a Judgment:

(a) Annulling the determination dated December 31, 1980, which denied the schools applications for renewal of licensed and ordered the schools to cease operation as licensed schools;

(b) Prohibiting and permanently enjoining Respondents from requiring the schools to collect and report the data as required in OEDS Forms 7 and 8;

(c) Compelling Respondents to grant the schools' applications for renewal of licenses; and

(d) Awarding Petitioners such other, further and different relief as to this Court may seem just and proper.

Dated: February 16, 1981

Yours, etc.

O'CONNELL AND ARONOWITZ. P.C.
(Peter L. Danziger and
Barbara G. Billet, of Counsel)
Attorneys for Petitioners
Office and P.O. Address
100 State Street
Albany, New York 12207
Tel. (518) 462-5601

STATE OF NEW YORK)
) ss. :
COUNTY OF)

Joel Kobran, President, Ejry, Inc. being duly sworn, deposes and says that it is one of the Petitioners, in this action; that he has read the foregoing Verified Petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOEL KOBRAN

Joel Kobran

Sworn to before me this
16th day of February, 1981.

FRANCES M. BURKE

Notary Public, State of New York

Frances M. Burke
Notary Public, State of New York
Qualified in Rensselaer County
Commission Expires March 30, 1981